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8                   UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
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10 F5 NETWORKS, INC.,

CASE NO. C10-654MJP

11                   Plaintiff,

ORDER ON MOTIONS FOR STAY  
AND PROTECTIVE ORDER

12                   v.

13 A10 NETWORKS, INC.,

14                   Defendant.

15  
16                   The above-entitled Court, having received and reviewed

17                   1. Defendant's Motion to Stay Proceedings for Reexaminations of the Patents-in-Suit  
18                   (Dkt. No. 46), Plaintiff's Opposition to Defendant's Motion to Stay Proceedings (Dkt.  
19                   No. 51), and Defendant's Reply Brief in Support of Motion to Stay Proceedings for  
20                   Reexaminations of the Patents-in-Suit (Dkt. No. 53);  
21                   2. Defendant's Motion for Protective Order Regarding Plaintiff's Pending Discovery  
22                   Requests (Dkt. No. 48), Plaintiff's Opposition to Defendant's Motion for Protective  
23                   Order (Dkt. No. 49), and Defendant's Reply Brief in Support of Motion for Protective  
24                   Order Regarding Plaintiff's Pending Discovery Requests (Dkt. No. 54)

1 and all attached declarations and exhibits, makes the following ruling:

2 IT IS ORDERED that the motions are DENIED.

3 **Background**

4 Plaintiff is one of the early entrants into the “load-balancing technology” (applications  
5 which permit distribution of workload across multiple computers or networks to maximize  
6 efficiency and response time and avoid overload) market. Defendant is a six year-old firm which  
7 offers competing products.

8 This patent infringement lawsuit has been pending for eight months. Plaintiff has  
9 amended its complaint twice, the second time to add a trade secret misappropriations claim  
10 unrelated to the patent issues. The parties negotiated an agreed case schedule and filed a Joint  
11 Status Report which does not mention any plan to petition for reexamination of the patents.

12 Only after receiving Plaintiff’s first set of discovery requests and its infringement contentions did  
13 Defendant indicate its intent to request reexamination by filing these motions. While Defendant  
14 claims that it will file the requests prior to December 13, 2010, there is no indication in the  
15 record that it has done so.

16 **Discussion/Analysis**

17 In support of its request for a stay of the proceedings, Defendant cites to a “liberal  
18 policy” of “this Court as well as sister district courts in the Ninth Circuit and the Federal  
19 Circuit... that favors granting motions to stay pending reexamination.” Motion, p. 3. While the  
20 Court is certainly aware that this district has consistently applied the same test to determine  
21 whether stays are appropriate in similar circumstances (*see infra*), it is unaware of any “policy”  
22 which favors the granting of such stays.

23 Plaintiff, on the other hand, cites decisions holding that stays are especially disfavored in  
24 litigation between direct competitors such as these parties. See Oracle Corp. v. Parallel

1   | Networks, LLP, 2010 WL 3613851 at \*3 (D.Del. 2010); Nidec Corp. v. LG Innotek Co., Ltd.,  
 2   | 2009 WL 3673433, at \*3-4 (E.D.Tex. 2009). For the reasons discussed below, the circumstances  
 3   | of this case do not favor the granting of a stay at this time.

4                 This Court does follow a three-factor test in analyzing these requests; the factors are:

5                 1. Will a stay simplify the issues in question?  
 6                 2. Is discovery complete with a trial date already set?  
 7                 3. Will a stay unduly prejudice or present a clear tactical advantage to the non-movant?

7   | WRE-Hol, LLC v. Pharos Science & Apps., 2010 U.S. Dist. LEXIS 83570, at \*4-5 (W.D.Wash.  
 8   | July 23, 2010)(citing Implicit Networks, Inc. v. Advanced Micro Devices, Inc., 2009 U.S. Dist.  
 9   | LEXIS 14467, at \*2 (W.D.Wash. Feb. 9, 2009)). The factors are analyzed separately below.

10                 *Simplification*

11                 Defendant's request for a stay is hampered by the fact that it has moved for a stay based  
 12   | on a request for reexamination (1) before the request has even been filed (Defendant indicates it  
 13   | will file the reexamination request by December 13, 2010, but there is no indication in the court  
 14   | record that such a request has been filed as of the date of this order) and (2) without specifying a  
 15   | single claim for which it will seek reexamination or a single issue of patentability with respect to  
 16   | any claim. Defendant argues that (according to the case schedule) it is not required to divulge its  
 17   | position on invalidity until December 13. That may be correct, but it does not alter the fact that  
 18   | it is not possible to predict whether a successful reexamination request will simplify the issues in  
 19   | the case if the Court does not know what they are.

20                 Furthermore, Defendant does not indicate whether its reexamination request will be *inter*  
 21   | *partes* (which permits the requester to participate in the process) or *ex partes* (in which the  
 22   | USPTO rules without input from the requester). The significance of this omission is that, if  
 23   | Defendant does request an *ex partes* reexamination, it will not be bound by findings of validity  
 24   | or modification, so once again the Court cannot predict if the issues will actually be simplified at

1 the conclusion of the reexamination process. Defendant merely responds that “this Court’s  
 2 precedent does not require disclosure of such case strategy before granting a stay.” Reply, p. 5.  
 3 Again, Defendant may be technically correct, but the Court remains in the dark on the  
 4 “simplification” issue.

5 Plaintiff also points out that, with 30 asserted claims in the case, it is unlikely that  
 6 reexamination will result in cancellation of all the claims. Plaintiff cites Defendant’s own  
 7 USPTO statistics to show that in only 13% of all *ex partes* reexaminations were all claims  
 8 cancelled. Response, p. 10. Additionally, there are causes of action in this lawsuit (the trade  
 9 secret misappropriation claim) which are not related to the patent claims and will not be affected  
 10 by the reexamination outcome. The result is that, regardless of the outcome of the  
 11 reexamination, there will still be triable issues remaining at the conclusion of this multi-year  
 12 process, which does not favor a finding of simplification or judicial economy.

13 *Stage of the case*

14 As Defendant points out, Plaintiff does not contest that the case is at a very early stage of  
 15 litigation. Although a trial date has been selected, it is 16 months away. Discovery has not yet  
 16 begun (although Plaintiff has propounded its first set of discovery requests). The Court finds that  
 17 this factor is in Defendant’s favor.

18 *Prejudice*

19 Plaintiff argues that the “direct competitors” aspect of this litigation means that, during  
 20 any delay occasioned by a reexamination stay (which Plaintiff estimates at two to three years, not  
 21 counting any appeal which follows), F5 would still be competing against the allegedly infringing  
 22 products of Defendant, losing market share as well as goodwill and reputation (which it claims  
 23 are not monetarily compensable). And, since it is unlikely that the reexamination request will  
 24

1 resolve all of the claims and causes of action, the parties will be back in front of this Court in  
2 another two to three years, with another 18 months after that before they get to trial. If no stay is  
3 granted, all issues are resolved less than 18 months from now.

4 The Court is further persuaded to deny the motion by the increasing likelihood that,  
5 between now and the point several years from now when the reexamination is concluded and  
6 litigation resumed, witnesses will become unavailable and memories will fade, a further  
7 prejudice to Plaintiff. The “prejudice” factor is decidedly in Plaintiff’s favor.

8 **Conclusion**

9 Based on the customary three-factor test, the Court finds that the elements of  
10 “simplification” and “prejudice” do not weigh in favor of granting Defendant’s request, and on  
11 that basis the motion for stay is DENIED. Since Defendant’s motion for protective order was  
12 premised on being granted its request for a stay, that motion is likewise DENIED.

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14 The clerk is ordered to provide copies of this order to all counsel.

15 Dated: December 10, 2010.  
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19 Marsha J. Pechman  
United States District Judge  
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